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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 337

UNITED STATES OF AMERICA, PETITIONER

v.

ELIZABETH C. MORRELL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Acting Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled cause on May 16, 1953.

OPINIONS BELOW

The opinion of the United States District Court for the District of Maryland (R. 7–16) is reported at 107 F. Supp. 658. The opinion of the Court of Appeals (R. 18–24) is reported at 204 F. 2d 490.

JURISDICTION

The judgment of the Court of Appeals was entered on May 16, 1953 (R. 25). By order of Mr. Justice Clark, dated August 3, 1953, the time for filing a petition for writ of certiorari was

extended to September 14, 1953 (R. 27). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether, under Section 602 (n) of the National Service Life Insurance Act of 1940, as amended, the Veterans Administration is required to apply a refund premium credit retroactively toward the payment of premiums not otherwise paid by the insured, where the existence of the credit was not ascertained until after the insured's death and the amount of the credit, if applied to the unpaid premiums, is sufficient to continue the policy in effect until the insured's death.

STATUTE INVOLVED

Section 602 (n) of the National Service Life Insurance Act of 1940, c. 757, 54 Stat. 1008, 1011, as amended by the Act of July 11, 1942, Sec. 5, 56 Stat. 658; by the Act of September 30, 1944, Sec. 7, 58 Stat. 764; and by the Act of August 1, 1946, Sec. 7, 60 Stat. 784, 38 U. S. C. 802 (n), provides as follows:

> Upon application by the insured and under such regulations as the Administrator may promulgate, payment of premiums on such insurance may be waived during the continuous total disability of the insured, which continues or has continued for six or more consecutive months, if such disability commenced (1) subsequent to the date of his application for insurance, (2) while the

insurance was in force under premium-paying conditions, and (3) prior to the insured's sixtieth birthday: *Provided,* That upon application made within one year after the date of enactment of the Insurance Act of 1946 [August 1, 1946] the Administrator shall grant waiver of any premium becoming due not more than five years prior to the date of enactment of such Act which may be waived under the foregoing provisions of this subsection: *Provided further,* That the Administrator, upon any application made subsequent to one year after the date of enactment of the Insurance Act of 1946, shall not grant waiver of any premium becoming due more than one year prior to the receipt in the Veterans' Administration of application for the same, except as hereinafter provided. Any premiums paid for months during which waiver is effective shall be refunded. The Administrator shall provide by regulations for examination or reexamination of an insured claiming benefits under this subsection, and may deny benefits for failure to cooperate. In the event that it is found that an insured is no longer totally disabled, the waiver of premiums shall cease as of the date of such finding and the policy of insurance may be continued by payment of premiums as provided in said policy: *Provided further,* That in any case in which the Administrator finds that the insured's failure to make timely application for waiver of premiums or his failure

to submit satisfactory evidence of the existence or continuance of total disability was due to circumstances beyond his control, the Administrator may grant waiver or continuance of waiver of premiums: *And provided further,* That in the event of death of the insured without filing application for waiver, the beneficiary, within one year after the death of the insured or the enactment of this amendment, whichever be the later, or, if the beneficiary be insane or a minor, within one year after removal of such legal disability, may file application for waiver with evidence of the insured's right to waiver under this section. Premium rates shall be calculated without charge for the cost of the waiver of premiums herein provided and no deduction from benefits otherwise payable shall be made on account thereof.

STATEMENT

Effective September 1, 1944, Captain Raymond C. Morrell was issued a policy of five year term National Service Life Insurance in the amount of $10,000, in which he designated as principal beneficiary Elizabeth C. Morrell, his wife, the respondent herein (R. 7). On March 29, 1946, the insured obtained a divorce from respondent (R. 6, 9).[1] Effective April 30, 1946, he discontinued his service pay insurance allotment by means of

[1] Shortly after the divorce, the insured married Mary Swann in violation of the divorce decree prohibiting remarriage within four months (R. 6). Following the insured's death, the divorce and remarriage were annulled on the petition of respondent (R. 6).

which he had theretofore paid his premiums, and as a result the policy lapsed for non-payment of premiums on May 31, 1946 (R. 7). From April 30, 1946, until his death on May 16, 1947, the insured paid no premiums either by allotment or by direct remittance to the Veterans Administration nor did he apply for reinstatement of the lapsed policy or for a waiver of premiums (R. 8).

Commencing October 2, 1945, and continuing until September 19, 1946, the insured was intermittently hospitalized in various service hospitals for a chronic arthritic condition (R. 7–8). He was on inactive military status from October 1, 1946, until January 17, 1947, when upon his application he was restored to active duty for an unlimited period (R. 8). The insured continued in an active duty status until May 16, 1947, when he died of heart failure resulting from arteriosclerosis with occlusion (R. 8).

On May 17, 1947, the day following the insured's death, respondent made written inquiry regarding her insurance rights and on July 21, 1947, submitted a formal application for the proceeds (R. 6).[2] In considering her claim, the Veterans Administration's Appeal Board determined that the insured had been totally disabled from October 2, 1945, until January 17, 1947, when he returned to active duty and, under Section 602 (n) of the

[2] The claim to the proceeds made by the insured's second wife, Mary Swann Morrell, was denied by the Veterans Administration on June 2, 1947, on the ground that respondent was named principal beneficiary in the policy (R. 6).

National Service Life Insurance Act, *supra*, pp. 2–4, was entitled to waiver of premiums from November 1, 1945, to February 1, 1947 (R. 7). The Appeal Board further found that the insured had been able and fit for active duty from January 17, 1947 to May 16, 1947, and ruled that since no premium had been paid from February 1, 1947, until the insured's death on May 16, 1947, the policy had lapsed (R. 8). In so holding, the Appeal Board recognized that the premiums paid by the insured between October 2, 1945, and April 30, 1946, were refundable, but refused to apply this credit as payment on the premiums due on and after February 1, 1947, since no instructions to that effect had been received from the insured (R. 8).

Following the Veterans Administration's rejection of her claim, respondent instituted this proceeding in the United States District Court for the District of Maryland. In addition to claiming that the insured was totally disabled from October 2, 1945, until his death,[4] the complainant alleged the foregoing facts and contended that the refund credit arising by reason of the posthumous determination of disability should be applied retroactively towards continuing the policy in force, despite the fact that the insured was already deceased (R. 1–2). Accepting respondent's conten-

[4] This contention was not pressed in the district court, no finding was made in respect thereto, and consequently, is no longer in issue in this case.

tion, the district court ruled that the Veterans Administration had erred in refusing to apply the refund credit to the premiums which became due February 1, 1947, and that, since the credit, so applied, was sufficient to keep the insurance in force until the insured's death, the beneficiary was entitled to the full face amount of the policy (R. 7–16).

The Court of Appeals affirmed, stating (R. 22):

> We see no reason why protection should not also be given to a policy holder who pays premiums during disability which are not due, but neglects to pay premiums which become due after his recovery. It then becomes the duty of the insurer under the general rule of insurance law to devote the funds of the policy holder to the payment of his debt, if they are sufficient for the purpose, and thus avoid a forfeiture. It goes without saying that the policy holder or his representative may have the money rather than the policy if he so desires; but that is not the case here, for the beneficiary has laid claim to the proceeds of the policy and the Veterans' Administration has determined the existence of the disability and the amount of the premium credit to which the insured was entitled.

REASONS FOR GRANTING THE WRIT

In the instant case, the insured discontinued payment of premiums contemporaneously with his obtaining what he thought was a divorce from respondent and, although he had become totally

disabled, he never applied for waiver. It was only after the insured's death that respondent—taking advantage of the insured's failure to remove her as his principal beneficiary, probably because he regarded a change of beneficiary to be an empty gesture since he had terminated the insurance—filed an application for waiver. As a result of this application, the Veterans' Administration determined that the insured had been entitled to a refund of those premiums paid while he was totally disabled, but ruled that, since there was no basis for implying the insured's consent, the premium credit could not be posthumously applied to pay premiums due subsequent to the termination of the disability in order to cure the lapse of the insurance.

In holding that the Government was obligated to pay respondent the full amount of the insurance, on the ground that, notwithstanding the insured's obvious lack of interest in the insurance,[4] the Government should have used the

[4] Every manifestation by the insured during his lifetime points to his desire not to continue the insurance; he discontinued his service-pay allotment after obtaining a divorce from respondent and remarrying; he failed to apply for reinstatement after the original lapse on June 1, 1946; and he failed to apply for new insurance upon his re-entry on active duty on January 17, 1947. There is no suggestion that the failure of the insured to file an application for waiver was "due to circumstances beyond his control." (Section 602 (n).) Cf. *Landsman* v. *United States*, 205 F. 2d 18 (C. A. D. C.), No. 336, this Term, petition for a writ of certiorari filed simultaneously herewith, on September 11, 1953.

unearned premium credit to pay premiums accruing after the termination of the insured's disability, the court below has failed to give effect to the plain provisions of the statute and the Veterans Administration's consistent administrative practice. In so doing, it has reached a result which conflicts in principle with decisions of other courts of appeals, improperly applies the principles of commercial insurance, and accords the beneficiary a right far greater than any right possessed by the insured during his lifetime. Since the ruling by the court below has an important impact on the administration of the National Service Life Insurance Act, review by this Court is fully warranted.

1. (a) Section 602 (n) of the National Service Life Insurance Act, *supra*, p. 3, expressly provides that "Any premiums paid for months during which waiver is effective shall be refunded." This provision makes it clear that the Veterans Administration has no authority over the disposition of the unearned premiums other than to hold them subject to instructions from the insured. Far from "merely serv[ing] to establish the policy holders' title to the fund," as suggested by the court below (R. 21), this provision operates to vest complete authority over it in the insured. Absent any indication from an insured as to what he wants done with it—and it is obvious in the instant case that the

insured did not and could not give any such indication since it was not known that he was entitled to the refund until after his death—the Veterans Administration may not dispose of the credit in any way, let alone as payments on subsequently accruing premiums. So to apply the premiums not only would effect a form of compulsory insurance contrary to the basic voluntary nature of the National Service Life Insurance Act (cf. *Williams* v. *Union Central Co.*, 291 U. S. 170, 179–181), but might render the Veterans Administration liable for the refund in the event that the insured should thereafter determine against continuing the insurance. And it certainly would not do to wait until the insured's death to determine whether the premiums should be refunded (if they were insufficient to keep the policy alive) or applied as the court has done (if they were adequate to extend insurance until death). See *infra*, pp. 18–20.

That the refundable premiums were not to be automatically applied to subsequent premiums is further evident from the fact that the second sentence in Section 602 (n), following that regarding refunds, provides that "In the event that it is found that an insured is no longer totally disabled, the waiver of premiums shall cease * * * and *the policy of insurance may be continued by payment of premiums as provided in said policy.*"

[Italics supplied.][4] Since Congress was undoubtedly aware that premium refunds would be due when a total disability terminated,[5] its deliberate inclusion of this provision for "payment of premiums as provided in said policy" plainly indicates that it regarded the refund credit as separate and distinct from premium payments and did not intend the refund to be applied automatically to the payment of subsequently accruing premiums.

Because it has regarded the refund credit as subject to the complete control of the insured, the Veterans Administration has, from the time of

[4] The Veterans Administration has provided by regulation that (38 C. F. R. 8.42 (b)):

"In the event a finding that insured is no longer totally disabled is made at the same time a finding is made of total disability entitling the insured to a waiver of premiums while so disabled, the waiver of premiums shall cease as of the date on which total disability ceased and continuance of the insurance in such cases shall be subject to the timely payment of the premiums as they become or have become due and payable. The due date of the first premium payable subsequent to the date total disability ceased is the next regular due date of the premium under the policy, and if such premium was not paid within 31 days after the due date, the insurance lapsed."

[5] Since, under the statute, there could be no waiver until the insured had been continuously totally disabled for six or more months, and only then was the waiver retroactively applied to the commencement of the disability, it was almost unavoidable, particularly in continuous total disabilities of relatively short duration, that there be unearned premiums to be refunded when the disability terminated.

the enactment of the National Service Life Insurance Act, uniformly followed the practice of using the credit to continue unlapsed insurance in effect only when such use is expressly or impliedly authorized or directed by the insured; in the absence of such assent, the agency has uniformly refunded the unearned premiums.[7] In accordance with this practice, the Veterans Administration has held, on the one hand, that, where the insured has agreed to continue to pay premiums in his application for waiver, there was no basis for implying assent to the use of the refund credit to pay premiums and consequently that the insurance lapsed upon the insured's failure to pay premiums when due. See Administrator's Decision No. 745, dated May 20, 1947; Administrator's Decision No. 794, dated October 4, 1948. On the other hand, where there is a basis for implying assent, the agency has ruled that it was

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[7] Since at least 1946, the Veterans Administration has been using a form letter (FL 9–74) which, after notifying the insured of the period during which he was entitled to waiver, advised:

"Under this decision, you are entitled to a waiver only for the period specified and if your premiums are currently being paid, you should continue to pay them as they become due if you wish to keep your insurance in force. All unearned premiums will be refunded as promptly as possible."

Although there have been minor revisions in the form, the substance of the above has been continued unchanged.

not legally improper to apply the premium credit to pay premiums due after the termination of total disability. See Solicitor's Opinion No. 416-50, dated August 23, 1950; cf. Administrator's Decision No. 902, dated April 15, 1952.* Thus, contrary to the statement of the court below (R. 24), the Veterans Administration has followed the consistent practice of not automatically applying the refund credit to the payment of premiums, but rather of being guided by the wishes of the insured as to the disposition of the credit. Such a long standing administrative practice, which is in complete accord with the complex provisions of the statute, is not lightly to be overturned. *United States* v. *Henning,* 344 U. S. 66, 75; *United States* v. *Zazove,* 334 U. S. 602; *United States* v. *Citizens Loan Co.,* 316 U. S. 209; *United States* v. *Madigan,* 300 U. S. 500; *Norwegian Nitrogen Co.* v. *United States,* 288 U. S. 294, 315; *United States* v. *American Trucking Ass'ns.,* 310 U. S. 534, 549.

(b) The holding conflicts in principle with *Parker* v. *Veterans Administration of United States,* 193 F. 2d 149 (C. A. 5) and *Jones* v.

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* This opinion did not involve a refund premium credit arising under Section 602 (n), but rather the application of the excess in premium payments on one of two policies held by the insured toward premium payments on the second policy to avoid a lapse in the latter.

United States, 189 F. 2d 601 (C. A. 8).* In these cases, which involved the application of dividends to the payment of premiums, the courts of appeals held, contrary to the contentions of the beneficiaries, that dividends declared after the insured's death could not be retroactively applied as payment of unpaid premiums so as to continue in effect otherwise lapsed policies; these holdings were based on the ground that such application would be contrary to the Veterans Administration's regulations (193 F. 2d at 150; 189 F. 2d at 603).

The court below sought to distinguish these cases on the ground that "the terms of the statute and regulations expressly provided that dividends should be paid in cash only and should not be available to pay premiums." (R. 22.) But while the Veterans Administration's regulation (38 C. F. R. (1952 Supp.) 8.26a) contained the provisions outlined by the court, the particular provisions were not required by any stat-

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* See, also, *Weiss* v. *United States*, 187 F. 2d 610 (C. A. 2), certiorari denied, 342 U. S. 820, rehearing denied, 342 U. S. 874. The decision of the court below is also contrary to unreported district court decisions in *Rose Shaw* v. *United States*, No. 991 (N. D. Ind.), and *Minnie Mae Kubala* v. *United States*, No. 6678 (S. D. Texas), pending on appeal in the Court of Appeals for the Fifth Circuit. But see *Marie F. Levitch* v. *United States*, No. 2005–47 (D. C. D. C.) and *George Eddy* v. *United States*, No. 1921 (W. D. Wisc.).

utory mandate, for, at the time involved in those cases, there was no statutory provision dealing with dividends other than a general authorization to the Administrator to issue regulations on that subject. See Section 602 (f) of the National Service Life Insurance Act of 1940, 38 U. S. C. (1946 Ed.) 802 (f).[10] In the instant case, in contrast, there is an express statutory requirement that the premiums paid and unearned during a period of waiver "shall be refunded" and there has also been a consistent administrative practice that the refundable premiums are not to be used to pay premiums owed after the termination of the disability, without the assent of the insured. In these circumstances, the reasoning of the *Parker* and *Jones* cases plainly requires affirmance of the Veterans Administration's ruling here.

(c) The principles governing commercial insurance, even if it be assumed that they are applicable to government-provided insurance

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[10] By the Act of May 18, 1951, c. 94, 65 Stat. 43–44, Congress amended Section 602 (f) by adding the provision that after January 1, 1952, unpaid dividends should be used as payment of premiums becoming due on the insurance subsequent to the date the dividend is payable, until and unless the insured in writing requests payment in cash. 38 U. S. C., Supp. V, 802 (f). No such provision has been enacted in regard to refundable premiums.

under the National Service Life Insurance Act,[11] do not support the court's conclusion. The rule that a commercial insurer "is not justified in declaring a forfeiture of an insurance policy for the non-payment of premiums when at the time the premiums accrue, the insurer is indebted to the insured either for dividends declared or other funds belonging to the insured which it may have in its hands" (R. 22) is subject to the limitation that where the policy makes express provision for the disposition of the credit, the insurer is prohibited, unless directed to do so by the insured, from applying the credit in a manner contrary to this express provision, even though so to do would be advantageous to the insured or the

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[11] There is a substantial body of authority for the proposition that the principles of commercial insurance are not applicable to insurance under the National Service Life Insurance Act. See, *e. g.*, *United States* v. *Holley*, 199 F. 2d 575, 578 (C. A. 5); *James* v. *United States*, 185 F. 2d 115, 118–119 (C. A. 4); *Niewiadomski* v. *United States*, 159 F. 2d 683, 687–688 (C. A. 6), certiorari denied, 331 U. S. 850; *Mikell* v. *United States*, 64 F. 2d 301 (C. A. 4); *Birmingham* v. *United States*, 4 F. 2d 508, 509 (C. A. 8); *Crawford* v. *United States*, 40 F. 2d 199, 200 (C. A. 2); *Wilber Nat. Bank* v. *United States*, 69 F. 2d 526, 528 (C. A. 2), affirmed on other grounds, 294 U. S. 120; *United States* v. *Lyke*, 19 F. 2d 876 (C. A. 9); *United States* v. *Jackson*, 34 F. 2d 241 (C. A. 10), affirmed on other grounds, 281 U. S. 344; compare *Kontovich* v. *United States*, 99 F. 2d 661 (C. A. 6).

beneficiary.[12] Since Section 602 (n) is an integral part of the contract between the insurer and the insured (*United States* v. *Henning*, 344 U. S. 66, 75; *United States* v. *Williams*, 302 U. S. 46, 50; *White* v. *United States*, 270 U. S. 175; *Lynch* v. *United States*, 292 U. S. 571, 575), and since, as we have shown, Section 602 (n) deprives the Veterans Administration of any control over the fund's disposition, the instant case falls squarely within this limitation.

Moreover, the rule as applied to commercial insurers is based on the principle that "it would be inequitable for an insurance company to forfeit a policy when it holds funds belonging to the assured which are presently payable * * *." *American Nat. Ins. Co.* v. *Yee Lim Shee*, 104 F. 2d 688, 694 (C. A. 9). Before the rule may be applied, therefore, a fund or credit absolutely due and payable to the insured must exist at the time the premium, otherwise in default, accrues. *Long* v. *Monarch Accident Ins. Co.*, 30 F. 2d 929, 930–931

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[12] See, *e. g.*, *Williams* v. *Union Central Co.*, 291 U. S. 170; *State Life Ins. Co.* v. *Spencer*, 62 F. 2d 640, 643 (C. A. 5), certiorari denied, 289 U. S. 746; *Kansas City Life Insurance Co.* v. *Freeman*, 120 F. 2d 106, 108 (C. A. 5); *Equitable Life Assur. Soc.* v. *Roberts*, 226 Ala. 8; *Gardner* v. *National Life Ins. Co.*, 201 N. C. 716; *Harden* v. *Occidental L. Ins. Co.*, 206 N. C. 230.

(C. A. 4). In the instant case, the refund credit did not come into being until after the insured's death, since it was only then that it was determined that he had been totally disabled. By that time, the default in payment of the premiums due subsequent to the termination of the disability had long since accrued. Thus, the commercial insurance rule is not controlling here for the further reason that the conditions for its application have not been satisfied.

2. The court also erred in holding that the requisite consent to the application of the refund to payment of premiums, if necessary, could be and had been given by the beneficiary after the insured's death. According to the court, the consent could be given by the beneficiary since she "stands in his [the policy holder's] place under the statute as the moving party in this case" (R. 22).

But the beneficiary more than stands in the place of the insured when she is permitted posthumously to elect to apply the premium credits toward the payment of premiums due during the interval between the termination of the insured's total disability and his death; the beneficiary is thereby given a right far beyond any had by the insured. While the insured, had waiver been granted during his lifetime, might have elected to have the credit used to pay subsequently due premiums, that election would necessarily be made prior to the materialization of the risk covered

by the insurance and without any guarantee that the premium credit would be sufficient to keep the insurance in force until his death. Such a right necessarily terminates with the maturing of the contract upon the insured's death.

In contrast, the beneficiary's right of election accorded by the court below is exercisable only after the insured's death, for only at that time does the beneficiary have rights in regard to the insurance contract. Yet at that time, the risk protected by the insurance has matured and the period between the termination of the disability and the insured's death is fixed; the beneficiary may by simple arithmetic determine whether to elect to apply the premium credit to unpaid premiums. Such a right not only exceeds the right of the insured but violates the basic concept of insurance, that of providing protection against future contingencies.

There is nothing in the National Service Life Insurance Act to support such a right in the beneficiary. The sole right accorded to the beneficiary by Section 602 (n) is to apply for a waiver of premiums for continuous total disability when the insured failed to do so during his lifetime. This right in no way dispenses with the other provisions of Section 602 (n), nor does it, we submit, confer upon the beneficiary the far different and greater right found by the court below. Cf. *Scott* v. *United States*, 189 F. 2d 863, 864 (C. A. 5), certiorari denied, 342 U. S. 878; see, also, *United*

States v. *Baker*, 191 F. 2d 1004, 1006 (C. A. 10); *Hendricks* v. *United States* 94 F. Supp. 142 (E. D. Tenn.).

Nor does the legislative history provide any basis for inferring such a right. As originally enacted in 1940, Section 602 (n) confined the right to apply for waiver to the insured. 54 Stat. 1011. The provision allowing the beneficiary to apply for waiver, where the insured had died without submitting an application therefor, was enacted in 1944 upon the recommendation of the Veterans Administration. Section 7 of the Act of September 30, 1944, c. 454, 58 Stat. 762, 764. The reason for the change, as stated in the Veterans Administration's letter of recommendation, was as follows: "* * * Under existing laws waiver of premiums cannot be granted except upon application by the insured. In certain cases it appears that failure to make timely application was due to the mental incompetency of the insured and in case the insured died without filing application, waiver could not be granted on application made by the beneficiary. The proposed amendment * * * would authorize application for waiver of premiums to be made by the beneficiary." S. Rep. No. 1105, 78th Cong., 2d Sess., p. 3; 90 Cong. Rec. 6146. The committee report on the 1944 bill incorporated the explanatory letter of the Veterans Administration. S. Rep. No. 1105, 78th Cong., 2d Sess.; 90 Cong. Rec. 7983.

3. The question presented is of continuing importance in the administration of the National Service Life Insurance Act. Not only has the problem already been raised in several district court cases (see fn. 9, p. 14, *supra*), but the Veterans Administration advises that the problem frequently arises before it. See *supra*, pp. 11–13. While precise information as to the number of such cases is not available, that agency has made a survey of 500 applications for waiver of premiums, selected at random, in which "total disability had been claimed or had been found to have terminated prior to the decision granting or denying waiver." This survey revealed that in one out of every eight cases "the possibility exists of applying refundable premiums to subsequently accruing premiums and it is fair to state that a substantial number of them would involve cases in which the insurance had already lapsed prior to the date of the decision." Applying these figures to the 39,154 waiver of premium cases decided in the last two fiscal years, the Veterans Administration estimates that about 5,000 involved applications for waiver, or decisions thereon, where the period of total disability terminated before the date of decision and "a substantial number, perhaps some figure between one-fifth and one-half, involved cases in which lapse had occurred." The agency further advises that "the number of such cases would be at least as large, probably larger, during the preceding

four years," and further that "it seems reasonable to expect that future experience will be of substantially the same character." In these circumstances, the instant case is an appropriate one for review by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

ROBERT L. STERN,
Acting Solicitor General.

SEPTEMBER, 1953.

U. S. GOVERNMENT PRINTING OFFICE: 1953

HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 337

UNITED STATES OF AMERICA,
Petitioner,

vs.

ELIZABETH C. MORRELL,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

HERBERT E. WITZ,
Attorney for Respondent.

The Daily Record Co., Baltimore 3, Md.

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OPINIONS BELOW

The opinion of the United States District Court for the District of Maryland, in favor of Respondent (R. 7-16), is reported in 107 F. Supp. 658, and the opinion of the United States Court of Appeals for the Fourth Circuit, affirming the Judgment in favor of the Respondent (R. 18-24) is reported in 204 F. 2d 490.

QUESTION INVOLVED

Is the Petitioner obligated to apply or set off refundable premiums due deceased insured, against premiums it claims to be due by insured, to prevent lapse or forfeiture of National Service Life Insurance policy?

STATEMENT

This cause now comes before this Court on a Petition by the United States of America for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit. The Court of Appeals affirmed the Judgment rendered by the District Court in favor of the Respondent, Elizabeth C. Morrell, whereby the proceeds of a certain National Service Life Insurance Policy were awarded to said Respondent.

The insured, Captain Raymond C. Morrell, now deceased, designated the Respondent, his wife, as beneficiary of said insurance policy, and his minor son, Raymond C. Morrell, Jr., as contingent beneficiary. Upon the death of the insured on May 16th, 1947, Respondent duly filed her application with the Veterans' Administration on July 21st, 1947, for payment of the proceeds of said policy.

After four and one-half years, the Respondent was finally notified on November 29th, 1951, by an Appeal Board of the Veterans' Administration, that said Board posthumously determined, as authorized by law so to do,[1] that Raymond C. Morrell had been disabled from October 2nd, 1945, to January 17th, 1947, fifteen and one-half months, and was entitled to waiver of premiums on said policy from November 1st, 1945, to February 1st, 1947. The Board further found that the insured had paid premiums on the policy

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[1] 38 U. S. C. 802 (n) provides: "* * * *And provided further,* That in the event of death of the insured without filing application for waiver, the beneficiary, within one year after the death of the insured or the enactment of this amendment, whichever be the later, or, if the beneficiary be insane or a minor, within one year after removal of such legal disability, may file application for waiver with evidence of the insured's right to waiver under this section. Premium rates shall be calculated without charge for the cost of the waiver of premiums herein provided and no deduction from benefits otherwise payable shall be made on account thereof."

from the date of its issuance,[2] to and through May 31, 1946, which included about seven months of the period of total disability when premiums were not legally due and chargeable to the insured. These premiums had been credited to his account, but never refunded, and are held by the Government to this date. The Board further found that inasmuch as the veteran reentered active duty on January 17th, 1947, his disability was held to have terminated as of that date and it therefore became necessary that premiums be paid subsequent to that date. The Government claimed no payments were made for the months of February, March and April of 1947, and therefore held that the policy lapsed on February 1st, 1947, three months prior to the insured's death.

Notwithstanding the fact that premiums had been thus paid during at least seven months of that period of disability, when the same were waived, as aforesaid, and notwithstanding the fact that said premiums had been credited to the insured's account and never refunded, the Government declined to set off said premiums in its possession against those premiums which it claimed to be due for the three months of February, March and April of 1947, and thus declared the policy had lapsed.

The Petitioner admits insured was to have reverted to an inactive status because of physical disability at the end of his terminal leave on April 30th, 1946, and while on such leave, he was admitted to the Regional Hospital at Fort George G. Meade, Maryland, on April 29th, 1946, and after further hospitalization and extensions of his terminal leave, finally reverted to an inactive status *because of physical disability* on October 1st, 1946. The insured was *recalled*

[2] Policy issued September 1, 1944.

to active duty on January 17th, 1947, and served at Fort Monmouth, New Jersey, until his death on May 16th, 1947.

At the time the insured expected to be separated from the Army on April 30th, 1946, and hence thereafter would not be entitled to further pay from the Army, he apparently instructed them to discontinue deductions for an allotment to cover insurance premium payments, such being part of the formality of being so separated. The Government admits that they received no instructions from the insured to cancel or discontinue his insurance, nor did they receive any instructions from him to make a refund of the aforesaid overpaid premiums. The insured was never notified that his policy had allegedly lapsed, but on the contrary, was notified by the Veterans' Administration by postcard, dated September 10th, 1946, more than four months after he had made his last premium payment, that they were transferring his National Service Life Insurance Account to their regional office at Richmond, Virginia.

Although Respondent maintains that certain facts which were the subject of a Joint Stipulation (R. 6) are irrelevant in this case, and were so found to be by the Courts below, the same pertaining to the marital and multiple-marital status of the insured and his wife, a brief resume thereof follows:

Without any knowledge of his wife, Elizabeth C. Morrell, whom he had married on August 11th, 1931, and while the insured was living with her and their young son in Baltimore, Maryland, in notorious tranquility, the insured surreptitiously applied for and was granted a divorce on March 29th, 1946, at Richmond, Virginia, on grounds of desertion.

On May 25, 1946, the insured married one Mary Swann on a sojourn to South Carolina. However, the insured con-

tinued to live with his wife, Elizabeth C. Morrell and their son in Baltimore, until his reactivation in the Army in Januray, 1947, without indication to the Respondent of his litigious activities at Richmond and his other marital encumbrances. The insured died as aforesaid, on May 16th, 1947, and thereupon discovering the fraud which had been practiced upon her, the Respondent filed a Petition in the Circuit Court of Baltimore City for annulment of the divorce decree, which the insured had obtained at Richmond. After proof of all of the foregoing facts, the Baltimore Court, on July 5th, 1949, declared the Virginia decree void on grounds of fraud by the insured practised (1) upon the Respondent in that she had never deserted him, nor been notified of such suit, and (2) upon the Virginia Court, in that the insured had never been a bona fide resident of Virginia. By virtue of this Baltimore decree the marriage of the insured to Mary Swann, was held void and the Respondent was declared to be the lawful widow of the insured. This decree was consented to by Mary Swann and her counsel.

The Veterans' Administrator did not conclude in his decision that there was any implied intent of the insured, by reason of the aforegoing facts, to require a cancellation of the policy. Obviously such an implication would be pure speculation and neither an administrative official nor a Court may indulge in such speculation. In fact, the Administrator held that the policy was revived by reason of the premium waiver posthumously found to be due, but the policy allegedly lapsed on February 1, 1947, when disability was said to have terminated. The Petitioner now injects that thought into this case, even though it was not argued on Appeal and even though the District Court properly dismissed any such contention and stated that it

boasted of nothing but speculation (R. 15-16). If there be any speculation, the law requires that it be in favor of the continuance of the insurance, rather than a forfeiture thereof.[3]

It is an historic rule of evidence that no one may speculate as to the intentions of a decedent with respect to a contract. The soundness of the rule is obvious.

REASONS FOR DENYING THE WRIT

I.

National Service Life Insurance Act provides that decisions of the Circuit Courts of Appeal shall be final.

38 *U. S. C. A.* sec. 445 — *Actions or claims; jurisdiction; parties; procedure, limitation; witnesses; definitions,* provides as follows:

> "In the event of disagreement as to claims, including claims for refund of premiums, under a contract of insurance between the Veterans' Administration and any person or persons claiming thereunder an action on the claim may be brought against the United States either in the District Court of the United States for the District of Columbia or in the District Court of the United States in and for the District in which such persons or anyone of them resides, and jurisdiction is hereby conferred upon such Courts to hear and determine all such controversies. The procedure in such suits shall be the same as that provided in sections 762 and 763 of Title 28 and section 765 of Title 28 so far as applicable * * * The Circuit Courts of Appeal and the United States Court of Appeals for the District of Columbia shall respectively exercise appellate jurisdiction and, except as provided in sections 346 and 347

[3] Magruder v. United States, 32 F. 2d 807, 810, cited with approval by Veterans' Administrator in his opinion No. 902.

of Title 28, *the decrees of the Circuit Courts of Appeal and the United States Court of Appeals for the District of Columbia shall be final.*" (Emphasis supplied.)

The obvious intent of the Congress was to make the Circuit Courts of Appeal the final resting place for adjudications of claims on Government insurance policies. It is contrary to the provision of the Insurance Act to have prolonged litigation. The claim of the Respondent has been pending for almost six and one-half years, and it is unreasonable and unjust to further protract the same.

II.

Decision of the Court below is not in conflict with that of any other circuit, or in conflict with applicable decisions of this Court.

The Petitioner fails to cite a single case from any other Circuit Court of Appeals which is in conflict with the decision of the Court of Appeals for the Fourth Circuit in this case, nor have we been able to find such conflicting decisions. On the contrary, the decisions in several Courts of Appeals cases, cases in the District Courts, and cases before this Court, as well as decisions of the Veterans' Administrator himself, adequately support the findings of the Court below.[4]

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[4] Mikell v. United States, 64 F. 2d 301, (C. C. A. 4); Magruder v. United States, 32 F. 2d 807, (D. C. D. Idaho, S. D.); Kontovich v. United States, 99 F. 2d 661, (C. A. 6); Marie F. Levitch v. United States, No. 2605-47, (D. C. D. C.), not appealed and insurance paid; George Eddy v. United States, No. 1921, (W. D. Wisc.); United States v. Zazove, 334 U. S. 602; White v. United States, 270 U. S. 175-180; Thomas v. United States, 189 F. 2d 494, (C. A. 6, 1951), certiorari denied 342 U. S. 850; Baker v. United States, 94 F. Supp. 350, (D. C. Utah, 1950), reversed on other grounds 191 F. 2d 1004, (C. A. 10); Scott v. United States, 189 F. 2d 863, (C. A. 5); Administrator's Decisions No. 745 dated May 20, 1945, No. 794 dated October 4, 1948, No. 902 dated April 15, 1952, and opinion of the solicitor of the V. A. No. 416 dated August 23, 1950.

In an effort to show such a conflict of decisions, the Petitioner cites the cases of *Parker v. Veterans' Administration of the United States,* 193 F. 2d 149 (C. A. 5), and *Jones v. United States,* 189 F. 2d 601 (C. A. 8). These cases involved the application of dividends, declared by the Veterans' Administrator years after the death of the insured, to the payment of premiums due by the insured. The question of dividends is not analogous since such dividends not only were non-existent during the lives of the insured, but the statute and regulations specifically provides that dividends shall be paid in cash only and should not be available to pay premiums.[5] There is no such statutory provision or administrative regulation with respect to premiums paid during a period of disability, when the same may become posthumously waived. It is clear that the Veterans' Administrator is not required to declare a dividend until he has determined the sufficiency of the insurance fund, from time to time. It is elementary that a dividend is not due until declared. On the other hand, the statute places a duty on the Administrator to determine the question of waiver of premiums and the premium status of the policy, upon application of the beneficiary after the insured's death. There is no discretion in the Administrator as to whether or not he will make this decision, whereas there is discretion in him respecting the matter of dividends.

It is strange indeed that the Government continues to argue (P. Br. 15) that there has been a consistent admin-

[5] 38 C. F. R., 1949 Ed. sec. 8.26a provides: "Any special National Service Life Insurance dividend that *may* be declared *shall* be paid in cash only. Such special dividend shall not be available to pay premiums." An earlier regulation, 38 C. F. R. 1949 Ed. sec. 8.26 had provided that dividend accumulations and unpaid dividends should not be available for the payment of insurance premiums, except at the written request of the insured, made before default in payment of premiums.

istrative practice that the refundable premiums are not to be used to pay premiums owed after the termination of disability or death of the insured, without the assent of the insured. The only published opinions of the Administrator dealing with this question fail to support the Petitioner's contention.[6]

The Petitioner now attempts to confuse the issue by bringing before this Court a maze of superficial figures, not in evidence and not a matter of public record, and which were compiled since the decision of the Court below, whereby the Government would have it appear that there were thousands of these cases before the Veterans' Administrator every week. We earnestly object to the introduction of any such matter at this stage of the proceeding. Assuming, however, in arguendo, that there was even a scintilla of accuracy or relevancy to the fancy figures now hurriedly compiled by the Petitioner, after more than six years since this case first came to its attention, we submit that it would prove nothing but dire neglect on the part of the Administrator. If there was such an alleged volume of cases, involving the question in the case at bar, we feel certain the Petitioner would not have administered this statute for more than thirteen years without the guidance of a Court decision. We further submit that the question of posthumously applying premiums paid during disability, when the same have become waived, to the payment of premiums alleged to be due, is one of the most infrequent situations in the administration of the statute. The Administrator has heretofore seen fit to rely on the previous Court decisions on this point in his administration of the Act.[7]

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[6] Administrator's Decisions Nos. 745, 794 and 902, supra.

[7] Mikell v. United States, 64 F. 2d 301 (C. C. A. 4); Marie F. Levitch v. United States, No. 2605-47 (D. C. D. C.) not appealed

The Court below, in construing Section 602 (n) of the Statute, applied the specific criteria set out by this Court in the case of United States v. Zazove, 334 U. S. 602-610, where it was said (R. 24):

> "The statutory provisions, where ambiguous, are to be construed liberally to effectuate the beneficial purposes that Congress had in mind. In this respect, judicial construction of the Statute may appear similar to construction of a commercial policy, where ambiguous provisions are generally construed in favor of the insured. * * *".

We believe it is clear that the Writ applied for may not be granted on the basis that the decision of the Court below is in conflict with that of any other Circuit, or with the decisions of this Court.

III.

There is no important question of Federal law here involved which has not been heretofore settled by this Court.

The Supreme Court of the United States has reviewed the National Service Life Insurance Act and its antecedent statute known as the War Risk Insurance Act on numerous occasions, and has ably stated how the same shall be construed. By way of guidance in the construction of the subject statute, this Court stated in the case of United States v. Zazove, 334 U. S. 602:

> "Moreover, whatever ambiguity exists in the language of Section 602 (h) (2) is dispelled by a consideration of the practice in effect under United States

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by the Government, and the overpaid premiums posthumously applied to premiums due whereby policy was paid in full; George Eddy v. United States, No. 1921, (W. D. Wisc.). See also Administrator's Opinions, supra.

Government Life Insurance, established for World War I veterans and the *long established practice of commercial insurance companies*, viewed as part of the background of experience which the draftsman of Section 602 (h) (2) may be assumed to have had in mind." (Emphasis supplied.)

In view of the decision in the Zazove case, supra, and in other cases heretofore considered by this Court covering the subject statute, it seems to us that there is no occasion, nor any question of Federal law now involved which has not heretofore been considered by this Court.

The Veterans' Administrator has heretofore been entirely satisfied with the opinions of his own Solicitor,[8] which opinions support the Respondent's case. He did not see fit to pursue appeals in two District Court cases[9] which involved the identical situation presented here. It was only the decision of the Administrator in the case at bar which was conceived in arbitrariness.

IV.

Application of doctrine of forfeiture applies to Government as insurance carrier, as well as to private insurance companies.

The universal principle, applicable to forfeiture of insurance in a private insurance company,[10] is applicable to National Service Life Insurance issued by the United States.

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[8] Administrator's and Solicitor's Opinions Nos. 902 and 416-50.

[9] Marie F. Levitch v. United States, (D. C. D. C.), and George Eddy v. United States, No. 1921, (W. D. Wisc.).

[10] Lamar v. Aetna Life Insurance Co., 85 F. 2d 141 (C. A. 10); American National Insurance Co. v. Yee Lim Shee, 104 F. 2d 688 (C. A. 8); Long v. Monarch Accident Insurance Co., 30 F. 2d 929 (C. A. 4).

This rule was adopted by the Court of Appeals for the Fourth Circuit at least as early as the year 1933 in the case of Mikell v. United State, 64 F. 2d 301. In the Mikell case the beneficiary of the Government insurance policy there involved was seeking to have salary due by the Government to the deceased insured applied against premiums due by the insured. The Court stated that when the Government goes into the business of insurance, it is permissible to apply to it the rules applicable to insurance companies, so far as transactions relating to insurance are concerned, but no further. The Court, however, very properly refused to apply salary due to the deceased against premiums due by him, salary being in no way connected with the insurance contract. See quotation from the Mikell case in Opinion of the Court below (R. 23).

It is curious to note that the Administrator of Veterans' Affairs and his Solicitor, favorably adopted the decision of the Court in the Mikell case, supra in Administrator's Decision No. 902 dated April 15, 1952,[11] in passing upon two

[11] Two cases are involved in this decision. X had continuous active service from January 29, 1943, to August 30, 1949. During his first enlistment in the Army he was issued $10,000 National Service Life Insurance, effective February 1, 1943. He paid premiums by allotment. He was discharged from the Army on January 3, 1946, and his allotment was discontinued. On January 4, 1946, he enlisted in the Air Force. He failed to register an allotment so that the insurance which had been issued to him during his service in the Army lapsed for non-payment of premium due February 1, 1946. While in the Air Force, on April 29, 1946, the insured remitted $13 to pay two monthly premiums. This remittance having been made after the grace period was not applied to premiums. The Veterans' Administration did not know at the time that the insured was in active service. In fact, his case file does not show any correspondence in connection with his insurance. He was discharged from his second enlistment on August 19, 1946, reenlisted the next day, and was placed on active duty August 20, 1946. On August 23, 1946, he applied for $10,000 National Service Life Insurance which was issued effective the same day under N-20 291 151. He made an allotment to pay the premiums

claims there before them. The two cases dealt with in Administrator's Decision 902, supra, were similar to the case at bar. After the Government's Solicitor quoted the language of the Court in the Mikell case, he made the following observations and conclusions:

> "It will be observed that the rule has no application if the debt of the Government arose out of transactions not connected with insurance. But when the Government *becomes indebted to the insured in relation to insurance matters, the application of the rule is justified because when the Government goes into the in-*

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in advance. He was finally discharged August 30, 1949. Premium deductions were made from his pay through August 31, 1949, which continued his insurance in force through October 22, 1949. On the date of his death, December 29, 1949, the Veterans' Administration held in its possession the said premium credit item of $13 which, if applied to premiums due on October 23, 1949, and November 23, 1949, with a shortage of 20¢ would continue the insurance in force through December 23, 1949, with a grace period of 31 days thereafter. Since the insured died within the grace period, the insurance would be payable if the premium credit item may be applied.

Y was issued $10,000 National Service Life Insurance effective February 8, 1943, under N-9 478 899. He executed an allotment for the payment of premiums in advance and under this allotment deductions were made to pay the premiums, including the premium due May 8, 1943. On April 29, 1943, the Veterans' Administration received a notice that Y, who was an aviation student, would be placed on duty requiring regular and frequent participation in aerial flights for the period of May 1, 1943, to May 31, 1943. Upon receipt of this notice, the prior insurance contract was discontinued and $10,000 National Service Life Insurance was issued to him as an aviation student under N-6 268 822. The Government paid the premium for the month of May 1943. Consequently, the amount deducted from his service pay for the premium due May 8, 1943, was not needed and the amount thereof, $6.60, was placed to his credit. Upon termination of his participation in flights on May 31, 1943, the insured stated that he did not wish to continue his aviation student insurance. He died in service on July 22, 1943. The amount held to his credit was applied to the premium due on June 1, 1943, and since his death occurred during the grace period, insurance was awarded to the beneficiary in 1944. The premium due for the grace month was deducted from the initial payment. * * *

surance business it is permissible to apply the same rules applicable to insurance companies insofar as insurance functions are concerned. It must be kept in mind, however, that the rule itself does not require or even permit the application to the continuance of insurance of money which the insured has directed be used for another specific purpose * * *". (Emphasis supplied.)

Here we have the Government itself contending exactly what the Respondent here contends and what the Courts below concluded in this case. It is therefore difficult to understand the Government's inconsistent position. As the Petitioner well knows, the Courts will not allow an administrative official to indulge in caprice and arbitrariness.

In the aforesaid Administrator's Decision 902, the specific question concerned the use of premium credit on one insurance contract to prevent lapse of another insurance contract. In each case the insured had died and the determination by the Administrator was made posthumously. In this decision it was said at p. 4:

> "* * * The fact that he did not request a refund of unused premiums previously submitted is at least consistent with the view that he expected and desired a continuance of insurance protection so long as money previously tendered would permit. It is pertinent to note in this connection what was said by the Court in the case of Magruder v. United States, 32 F. 2d 807, 810, (D. C. C. Idaho, S. D., 1929):
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> > '* * * the rule recognized by the Courts (is) that the cancellation of an insurance contract must be absolute and in clear language. No presumption should be dealt in when determining whether a contract of insurance was canceled, and if there should be any ambiguity as to whether an instrument constitutes a cancellation it should be construed most strongly against the party seeking a forfeiture.' "

The Government's Administrator then goes on to hold:

> "HELD: A premium credit item held to the account of an insured on the date of lapse of the insurance, sufficient in amount to prevent lapse, may be so used, even though the credit resulted in connection with another insurance contract, unless the insured has directed that the credit is to be used for another purpose. Such direction may be found in the provisions of the insurance contract, either express or necessarily implied in a communication by the insured to the Veterans' Administration, or in any manner in which the intention of the insured is manifested. Having applied such principles to the two cases set forth in this decision, it is concluded that the insurance is payable in each case (Opinion of the Solicitor, dated January 2, 1952, approved March 24, 1952. XC-9 286 224, XC-3 273 145).
>
> "This decision is hereby promulgated for observance by all officers and employees of the Veterans' Administration."

The above quoted decision of the Administrator goes much further than the Respondent sought to go in this case. There it was found proper and within the scope of section 802 (n) to apply premiums paid on one insurance policy to another policy in order to prevent a forfeiture or lapse thereof. Here Respondent has merely sought to have premiums paid on the insurance policy sued upon, applied to that policy (not to another) in order to prevent a lapse.

In the case of Kontovich v. United States, 99 F. 2d 661, (C. A. 6), the Court held:

> "* * * such Government contracts are to be construed by the same rules as like contracts involving private parties and the jurisdiction conferred on the Courts to administer such contracts must be exercised in accordance with the laws governing the usual procedure of the Courts in actions for money compensation."

Again in the unreported case of Marie F. Levitch v. United States, decided by the District Court for the District of Columbia, January 29, 1948, and not appealed by the Government, wherein the facts are essentially the same as those in the case at bar, it was said:

> "(The Court) The motion is granted for the following reasons: It appears from the admitted facts in this case that for a certain period prior to his death the insured was totally disabled and was entitled to waiver of premiums on the policy, pursuant to the United States Code, Title 38, section 802, subsection N. However, the premiums were paid for that period.
>
> "Under the foregoing section of the statute either the insured's beneficiary was entitled to a refund of the premiums so paid — actually no refund was made and the Government still retains the money. Subsequently total disability of the assured, from which the waiver of premiums was predicated, ceased. If the premiums that should have been refunded but have not been refunded, were applied to the premiums during the last mentioned period, the policy would have been alive at the time of the death of the insured, and the beneficiary would be entitled to recovery.
>
> "The Court holds that the Government was under an obligation to do one of two things, either make the refund or else apply the money in its hands to the premium on the policy. It could not just hold the money and make no application of it in the absence of any instructions to that effect. Even if the Government did not wish to apply the money, it should have tendered a refund. It seems to the Court that the Government is under an obligation to the same extent to which a private insurance company would be under similar circumstances, otherwise the Government insurance would be of doubtful value.
>
> "The Court feels that not merely as a matter of law, but also as a matter of equity, since the Government has money in its hands belonging to the insured, it was

under a duty to apply that money as against any obligation due the Government from the insured, in this case the premium."

The Petitioner completely disregards the fact that the statute expressly gives the beneficiary the right to make application for waiver of premiums after the insured's death. If the argument of the Petitioner was sound then that part of the statute giving the beneficiary the right to do what the insured could have done during his life would be a nullity. This would be a form of statutory repeal by administrative edict. We submit that the Administrator has no such legislative power.

The Congress gave this right to the beneficiary knowing full well that the same involved a posthumous determination of this question of waiver, and the disposition of overpaid premiums.

The Petitioner knows full well that the decisions in the Levitch case, supra, as well as in the cases in Administrator's Decision No. 902, supra, all involved posthumous determinations and in those cases there was no application filed by the insured for waiver during his lifetime and no other directive from the insured.

V.

The applicable statute creating National Service Life Insurance shall be liberally construed in favor of insured.

The aforesaid Sec. 802 (n) of the statute, together with certain other sections thereof, was amended by the Act of 1946. The Bill in Congress calling for the amendment of the National Service Life Insurance Act was referred to the Senate Committee on Finance, and that Committee

in its report, which report may be found in the U. S. Code Congressional Service, 1946, at p. 1394, stated the purpose of the Bill as follows:

> "The purpose of the Bill is to liberalize certain provisions of the National Service Life Insurance Act to overcome certain deficiencies and inadequacies in existing law which will be hereafter explained."

It is doubted that anyone would seriously contend that the Congress which passed the subject Insurance Act was motivated by any other desire or intention than to aid the men and women in the armed services and their dependents, and to help alleviate some of the hardships resulting from their military service. It is ironical that the Government which so generously came to the assistance of the armed forces in this matter of life insurance, as it did in many other special benefits, now contends that it was not as liberal as advertised.

The Courts have uniformly adopted a liberal construction of the National Service Life Insurance Act, in favor of the insured.[12]

Section 802 (n) of the statute is in two distinct parts. It distinguishes between the rights and duties of the *insured*, and the rights and duties of the *beneficiary*, with respect to the question of waiver of premiums. This analysis of the section was made in the case of Baker v. United States, supra (n. p. 7) where it was said:

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[12] McDonald v. United States, (D. C. Mass.), 1950, 91 F. Supp. 163; Thomas v. United States, (C. A. 6th), 1951, 189 F. 2d 494, certiorari denied 72 S. Ct. 78, 342 U. S. 850; Gamez v. United States, (D. C. Texas), 1951, 95 F. Supp. 656; Richards v. United States, (D. C. W. Va.), 1950, 93 F. Supp. 208; Lewis v. United States, (C. C. W. Va.), 1952, 105 F. Supp. 33; Golden v. United States, (D. C. Ala.), 1950, 91 F. Supp. 950; United States v. Zazove, 334 U. S. 602; White v. United States, 270 U. S. 175.

"The whole of the section (802n) through the third proviso is concerned with the application of the *insured* (for waiver). The fourth proviso is concerned with the application of the *beneficiary.*"

"The whole section is intended to be beneficial to the veteran. Everything Congress does here is to help him. They let him go back to five years prior to August 1, 1946 in the first proviso. In the second proviso they give him a year after August 1, 1946. And in the third proviso they say if a man were in the March of Bataan, or locked up in a prison or in a war camp somewhere, or some condition existed which was beyond his control, and due to that condition he did not apply, he gets the benefit of that."

"All the way through they were trying to help him. And then finally they help him by saying, if you die, under the circumstances which I have indicated the beneficiary has a year more."

In the case of Kontovich v. United States, 99 F. 2d 661, (C. A. 6), the Court aptly expressed the spirit of Government Life Insurance and the manner in which the same will be construed, it was said:

"The War Risk Insurance Act was intended to afford the soldier the advantages of ordinary life and accident insurance, which were no longer reasonably available to him and being substitute insurance, such Government contracts are to be construed by the same rules as like contracts involving private parties and the jurisdiction conferred on the Courts to administer such contracts must be exercised in accordance with the laws governing the usual procedure of the Courts in actions for money compensation."

The Petitioner at times maintains that the one sentence in section 802 (n), "*Any premiums paid for months during which waiver is effective shall be refunded* * * *", taken

out of context, supports its contention in this case. It seeks to commit surgery upon the statute and sever this one magic sentence from the first part thereof dealing with the rights and duties of the insured, and to graft it on to another distinct part of the section pertaining to the beneficiary, for the purpose of its case.

It would be untenable to say that Congress intended to pass such a generous piece of legislation and give such broad powers to the Administrator thereof in every other respect, except one. Neither the Courts have nor the Administrator himself[13] has heretofore placed such a rigid construction on this section of the statute.

It is true that the beneficiary has no greater rights under this section than the insured had during his life, but we insist that the beneficiary has no less rights than the insured had.[14]

It is submitted that the Congress never intended to give the Government the right to stand by and wait until after an insured had died to make an election as to whether it should refund excess premiums or apply them on account of premiums due. Such would be contrary to every principle of simple justice and equity.

The Petitioner admitted in the Courts below that the overpaid premiums are now refundable. However, it strangely argues here for the first time (P. Br. 10) that *"the Veterans' Administration may not dispose of the credit in any way* * * *". Certainly the Petitioner is not serious for such would be an admission of confiscation of the pre-

[13] Administrator's Decision No. 902, April 15, 1952.

[14] Baker v. United States, 94 F. Supp. 350, 191 F. 2d 1004; Scott v. United States, 189 F. 2d 863; Levitch v. United States, (D. C. D. C.), unreported and not appealed by Government.

mium credit fund held in trust for the insured and his beneficiary.

The Government now contends, also for the first time (P. Br. 10), that to apply the premium credit to the payment of premiums due *"might render the Veterans' Administration liable for the refund in the event that the insured should thereafter determine against continuing the insurance."* We are wondering how the deceased insured in this case will return to this earth and hereafter determine against continuing the insurance. We submit that the doctrine of reincarnation does not apply in this case. The Petitioner is obviously confusing waiver claims made by the policyholder with those made by the beneficiary under the express terms of the statute.

CONCLUSION

It is respectfully submitted that there is no reason for granting a Writ of Certiorari in this case, and therefore the Writ should be denied.

Respectfully submitted,

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